basis of these decisions the writer of a note in 10 MICH. L. REV. 315 formulated the propositions that the new "offer must be one to mitigate and not to substitute; it must be unconditional and not conditional, and lastly, must be without abandonment of waiver." He hazarded further that "A fourth essential might well be inferred from the whole case, and that is that the offer must be beneficial in order to make its acceptance necessary." The trouble with all these refinements is that in every case the question is still one of fact as to which of these two sets of antinomic words applies. Finally, the writer of the note in 16 MICH. L. REV. 536 suggests that all these forced distinctions between words should be abandoned, and that "The sole question should be: Is it reasonable under all the circumstances that the new offer should be accepted?" This is apparently an anticipation of the conclusion in our instant case.

DOWER IN EQUITABLE ESTATES.—D's husband during coverture contracted to purchase land from P and paid $900 on the contract. The contract was assigned to X and D did not join in the assignment. In a suit to foreclose by P, D claims a dower interest as against X in the surplus. *Held,* D not entitled to dower in equitable estate not owned by her husband at the time of his death. *Corcorren* v. *Sharum* (Ark., 1920), 217 S. W. 803.

Prior decisions in Arkansas had established that the general statute providing that a widow should be endowed of all lands whereof her husband was seised of an estate of inheritance extended the right to dower to equitable as well as legal estates. *Kirby* v. *Vantrece,* 26 Ark. 368; *Spaulding* v. *Haley,* 101 Ark. 296. A similar statute has been held to be merely declaratory of the common law and that dower would only attach to legal estates. *Will of Prasser,* 140 Wis. 92. But the court in a later case decided that a full equitable title in realty with a right to be immediately clothed with the legal title is substantially a legal estate within the meaning of the dower statute. *Harley* v. *Harley,* 140 Wis. 282. So zealous indeed are the courts to extend the right of dower to equitable estates that one court at least has extended the common law rule without the aid of any statute. *Shoemaker* v. *Walker,* 2 Serg. and R. (Pa.), 554. In some states dower is limited by statute to the equitable estates of which the husband died seised. *Thompson* v. *Thompson,* 1 Jones, 430. But in other jurisdictions the same result has been reached by judicial decision. *Heed* v. *Ford,* 16. B. Mon. (Ky.) 114; *Bowie* v. *Berry,* 1 Md. Ch. Dec. 452; *Morse* v. *Thorsell,* 78 Ill. 600; *McRae* v. *McRae,* 78 Md. 270. But see *James* v. *Upton,* 96 Va. 296. While the former Arkansas cases may be supported by interpreting the words estates of inheritance as meaning either in law or in equity, the principal case has read into the statute a limitation of dower in equitable estates which they refuse to apply to dower in legal estates, a doctrine certainly not warranted by the words of the statute.

EQUITABLE PROTECTION OF EASEMENTS—BALANCE OF CONVENIENCE.—Plaintiff owns a city lot upon which formerly stood an old house in the cellar of which was an excellent well. Defendant owns an adjoining lot on which is his residence, which was formerly connected by an underground pipe with

the well, to the enjoyment of which connection defendant has a right of easement. Plaintiff, preparatory to building a new house on his lot, tore down the old house, cut off the pipe line at the boundary of his lot, and walled up the well to the level of the ground. It does not appear that it was impossible, or even expensive, to make the improvements without disconnecting the well. Defendant's house is adequately supplied with water by the city system, but the well furnished superior drinking water. Defendant began to dig across plaintiff's lot to restore the connection. Plaintiff sues to enjoin this operation. Defendant asserts his easement, claims damages for its disturbance, and prays for an order requiring plaintiff to restore the connection. *Held,* defendant entitled to damages for disturbance of his easement, but not entitled to equitable relief, and plaintiff entitled to an injunction against trespass. *Wilkins* v. *Diven* (Kans., 1920), 187 Pac. 665.

This decision is put upon the broad ground that "Easements * * * are given greater significance in England than in America. * * * It would ill accord with our ever advancing development and progress to tie us down too rigidly * * * to old ways and old notions." The authorities cited are cases holding that, on the facts, there was no easement. This application of the balance of convenience doctrine is startling. Upon a motion for preliminary injunction, where the court must act on probabilities as to the rights of the parties, it is quite appropriate that it should consider the hardship upon the respective parties, and the effect on the public, of giving or refusing relief. At final hearing, when the rights of the parties have been ascertained, the application of the doctrine is obviously more questionable. The stock argument for it is that injunction is not a remedy of right but of grace. The stock objection is that the denial of specific relief works an informal condemnation for private use, an objection the force of which depends upon the wisdom with which the doctrine is applied, for there clearly are cases where such condemnation is very much to be desired. Reference to the balance of convenience at final hearing is most familiar in cases of nuisance, and may be considered most appropriate there. Since the basic rights depend upon a balance of conflicting interests, the law being one of degree, of live and let live, we may well say that, between the annoyances which one must endure without remedy and those against which one should be specifically protected, lie intermediate cases where damages, but damages alone, are appropriate. Outside of this peculiar nuisance group, the cases are very rare in which protection of ascertained rights has been refused on the balance of convenience, and these cases have been very strong upon their facts. See *Lynch* v. *Union Inst.,* 159 Mass. 394; *Hall* v. *Rood,* 40 Mich. 46; *Welsh* v. *Taylor,* 50 Hun. 137. The principal case is extreme in its denial of equitable relief to defendant. But how much more extreme it is in granting to plaintiff an injunction the effect of which is to abet the tort by restraining defendant from the exercise of the privilege of self-help, which is incident to his easement. In this aspect, the case seems to be wholly without support in authority and wholly outside the doctrine of "grace." The nearest analogy to it is the doctrine of equitable waste, which has always been re-

garded as anomalous, though grounded in good sense and sound policy. The principal case cannot be commended for sense or policy unless we assume that the maintenance of the water connection would prevent, or render very difficult, the improvement of the plaintiff's land, facts which do not appear in the report.

EVIDENCE—ADMISSION BY SILENCE TO ACCUSATIVE DECLARATION AFTER ACCIDENT ADMISSIBLE.—In action for injuries sustained when struck by defendant's jitney bus it appeared that a bystander, after the accident, had told defendant he "ought to be strung up by the heels for running into a woman in that fashion." Defendant made no reply. This was offered in evidence and objected to. *Held,* properly admitted as an admission by silence when circumstances called for a reply, though the declaration of the bystander in itself, apart from the fact that it was unanswered, tended to influence the jury, and though not competent as proof of any fact implied in the declaration. *Baldarachi et al.* v. *Leach* (Cal., 1919), 186 Pac. 1060.

This court laid down as the better rule and the weight of authority on this question that when any declaration or question is directed to a party which challenges or suggests a response from one who could truthfully dispute or negative it, such is admissible in evidence, and it is for the jury to determine, in the light of all the circumstances, whether any significance attaches to a failure to reply; further, that the weight to be given this evidence depends upon how provocative the situation is to speech and how significant is the silence. The California Civil Code provides that evidence may be given of "an act or declaration of another in the presence and within the observation of a party and his conduct in relation thereto." The court in the present case, however, considers this to be merely the legislative statement of a recognized common law rule of evidence. Such a rule is undoubtedly often recognized and followed. See WIGMORE ON EVIDENCE, Vol, 2, §1071; *State* v. *Ellison,* 266 Mo. 604; *Int. Harvester Co.* v. *Voboril,* 187 Fed. 973; *Proctor* v. *Ry.,* 154 Mass. 251. It clearly could not be held as a matter of law that failure to make a response in such case would indicate a sense of guilt; if admitted at all, the jury must be the sole judges of the significance and weight of such evidence. Further, in the case of *State* v. *Ellison,* cited *supra,* the following qualification of such doctrine is laid down: that such failure to reply cannot be admitted in evidence "if voluntarily made by a stranger, that is, a person not a party to the action, and therefore an impertinence." The court in the case at hand notices this feature, but nevertheless allows the admission of this evidence. It is difficult to perceive why the present case would not come squarely within the above prohibition, and if such be the law, this would appear to be an unwarranted extension of the doctrine. In fact, the court did show some hesitation, and expressed as its own opinion that the significance of the defendant's silence was here practically negligible as evidence of an admission. This evidence, it seems, may well have prejudiced the defendant's rights in the present case. But the qualification above mentioned appears to be denied in *Boyles* v. *McCowen,* 3 N. J. L. 677, and perhaps in other cases, on the ground that it is the non-